THE EXTENSION OF THE RIGHT OF WAIVER.

It occasionally happens that a party to an action, at the time of trial, is unaware of or fails to claim some substantial right or waives, knowingly or otherwise, some valid objection that was open to him, or may even have stipulated with his opponent that he will not avail himself of a particular right or objection that is clearly his. But at a later stage of the proceedings—on appeal or on motion for a new trial—he may seek to make his own waiver the basis of a demand for a new trial, on the ground that the court should not have permitted him to forego his rights.

The general rule is clear—no relief should be given one who through ignorance was unable to assert his rights at the proper time or who would now overthrow a clearly expressed stipulation —a result as just on moral as on legal grounds.

But there is a broad and not very well defined territory in which frequently occur questions of great difficulty, perhaps most often in criminal law, but sometimes in constitutional law or in the law of evidence, wherein the court is called upon to weigh what may be termed the rights of the public in the individual as against the rights of the individual in himself, and on the ground of public policy perhaps overrule the most clearly expressed waiver. The rule which we have mentioned is succinctly stated by Earl, J., in *Matter of New York, Lackawanna & Western R. R.*:[1]

"Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts."

And in a federal criminal case[2] it was laid down that:

[1](1885) 98 N. Y. 447, 453.

[2]Low *v.* United States (C. C. A. 1909) 169 Fed. 86, 92.

"Undoubtedly the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court."

Keeping in mind these general principles, let us take up some of the cases where exceptions have been made or have been suggested, because the waiver was alleged to fall within one of the three classes of cases mentioned in the New York case—that it was unreasonable, against good morals or against sound public policy.

It is oftenest in criminal cases that we find the court refusing to be bound by a defendant's waiver; and this for the familiar reason, well put in *Cancemi* v. *People*,[3] that "no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law.'"

Thus, in the case last cited, it was held that the written consent of the defendant to his trial for murder by a jury of eleven was a nullity—a rule which is supported by the preponderance of authority, although there is considerable authority *contra*.[4]

Similarly, a defendant cannot consent to the trial of his guilt or innocence of a charge of murder upon an application for his discharge on *habeas corpus*,[5] nor can his consent confer jurisdiction upon the court to try a plea of former jeopardy without a jury,[6] nor can the prosecuting attorney and the defendant stipulate to waive a jury trial, in a federal court,[7] nor can the defendant consent that his trial for a capital crime shall proceed in his absence.[8]

Matter of Langslow[9] raised an interesting question. The law of New York[10] provides, with one or two exceptions, that payment of money shall be enforced by execution and not by con-

[3](1858) 18 N. Y. 128, 137.

[4]Thompson *v.* Utah (1898) 170 U. S. 343, 353; State *v.* Kaufman (1879) 51 Iowa 578, 2 N. W. 275, where the authorities are collected.

[5]People *v.* Rulloff (N. Y. 1860) 5 Park. Cr. 77, 81.

[6]Grant *v.* People (N. Y. 1860) 4 Park. Cr. 527, 534.

[7]Low *v.* United States (C. C. A. 1909) 169 Fed. 86, 92. See also cases in 21 Cyc. 151 *et seq.*

[8]Hopt *v.* Utah (1884) 110 U. S. 574, 579.

[9](1901) 167 N. Y. 314.

[10]N. Y. Code Civ. Pro. §§ 16, 779, 1240.

tempt proceedings. Can a debtor stipulate that an order, the disobedience of which would be a contempt and subject him to imprisonment without bail, may be entered directing him to pay any sum found due?

The decision was in the negative—a man cannot consent to his own imprisonment for debt in a case not provided for by law, nor can the court acquire jurisdiction to make a summary order for the payment of money merely by consent of the parties when the law does not give it that jurisdiction.

But the decisions are far from unanimous, and how uncertain is the line of demarcation is indicated by such cases as *People* v. *Thayer*,[11] holding that a defendant waives the right to object to a juror over seventy years of age by failing to challenge him, *People* v. *Fishman*,[12] holding that the decision in *Cancemi* v. *People* does not apply to a case where a juror was withdrawn by consent because of a conversation with the complaining witness, and *Diaz* v. *United States*,[13] holding that the right of confrontation with witnesses under the Philippine Act is a privilege which may be waived by the accused as he sees fit.[14]

Where the defendant has voluntarily absented himself, in a case not capital, it has been held that he can and does waive his privilege of being present when the verdict of the jury is received;[15] but in a capital case it has been held that even his voluntary absence is not a waiver of his right.[16] There is no logic in treating a capital case differently from one not capital, and the distinction made, as the case last cited states, is merely one *in favorem vitae*.

Two comparatively recent decisions in New York further weaken the authority of *Cancemi* v. *People*.[17] In *People* v. *Cosmo*[18] the Court of Appeals held that while the constitutional right to a common law jury of twelve could not be waived in a criminal case, yet the defendant may waive his purely statutory rights in respect to the property qualifications of jurors; and in

[11](N. Y. 1908) 61 Misc. 573, 576.

[12](N. Y. 1909) 64 Misc. 256, 266.

[13](1912) 223 U. S. 442.

[14]See also People *v.* Guidici (1885) 100 N. Y. 503, 508.

[15]State *v.* Gorman (1911) 113 Minn. 401, 129 N. W. 589.

[16]Sherrod *v.* Mississippi (1908) 93 Miss. 774, 47 So. 554.

[17](1858) 18 N. Y. 128, 137.

[18](1912) 205 N. Y. 91.

People v. *Toledo*[19] the Appellate Division laid down the rule that an accused has the right to waive his objection to a second trial by a jury on which were eleven jurors who had sat in his first trial.

That a person accused of crime may waive all of his constitutional rights, as is asserted in *People* v. *Burke*,[20] is too broad a statement; but that he may waive none of them is equally incorrect as a statement of present law. However, to mark the dividing line in this "twilight zone" is a task of considerable difficulty, as the cases cited show. There is no doubt that "the tendency now is to construe statutory and even constitutional safeguards so as to preclude their perversion into expedients for cheating justice,"[21] and to incorporate something of a "rule of reason" even into criminal cases.

Suppose in a criminal case a prosecuting officer admits after conviction and on appeal by the defendant that a substantial error was committed in the rejection of certain testimony—is the admission binding on the appellate court? This interesting question, raising the same point as the waivers we have been considering, has been decided each way. In *State* v. *Stevens*[22] the court held that, of itself, such confession of error was not sufficient to warrant a reversal of judgment. Without much reasoning on the point, the Supreme Court of Virginia reached a contrary result in *Harris* v. *Commonwealth*.[23] The latter decision can hardly be justified on any of the grounds we have discussed. Certainly the prosecuting officer is *functus officio* after a conviction, with respect to the right to stipulate as to whether evidence was properly rejected or not, and the Virginia court seems to have laid down a doctrine that has justifiably been called "heretical."[24]

Turning to some of the examples of waiver in civil cases, it is obvious that here there will be many instances where no question of public interest is involved, and hence the exceptions to the general rule that a waiver is binding will be few. Thus, the failure of a party to object at the proper time to testimony inadmissible under the "parol evidence rule" is deemed a waiver that on appeal binds the appellate court, which will consider such evidence as though

[19](1912) 150 N. Y. App. Div. 403.

[20](N. Y. 1911) 72 Misc. 336, 338.

[21]N. Y. L. J., June 11, 1912.

[22](1910) 153 N. C. 604, 69 S. E. 11.

[23](1909) 110 Va. 905, 68 S. E. 834.

[24]N. Y. L. J., Nov. 22, 1910.

it were properly admissible.[25] This is a specific instance of the result almost always reached in other classes of civil cases where inadmissible evidence has been received without objection and no question of public policy is involved. Brickell, C. J., in *Birmingham Ry.* v. *Wildman,*[26] states that "parties have an undoubted right to try their case on illegal evidence, if they so desire, and if illegal evidence is admitted without objection, it is the right and duty of the jury to give it such consideration as it would be entitled to if legal evidence." The opinion of the Chief Justice goes so far as to hold that a waiver by the parties of the right to reject irrelevant testimony is binding on the presiding judge, who cannot caution the jury to disregard such testimony.

This result seems founded on correct legal principles, for the law of evidence, as Professor Thayer has pointed out[27] "is concerned with the operations of courts of justice, and not with ordinary inquiries *in pais,*" and when parties are permitted, within bounds that do not add unreasonably to the expense or burden of operation of courts of justice, to fashion their own law of evidence, no public harm is done. It should be borne in mind that much inadmissible evidence is, after all, relevant to the issue, and has been excluded because of some general rule of expediency not perhaps particularly applicable to the case under consideration. In other words, if the parties make an agreement between themselves which, in their judgment, is better adapted to the protection of their respective interests than the provisions of the common law or of the statutes, then there is no reason why they should not be bound by waiver of statutory or even constitutional provisions, provided that no consideration of public policy is involved.[28]

On similar reasoning, it has been held that the protection of the statute of limitations[29] and of the statute of frauds[30] may be waived. And not only may a defendant waive the statute of limitations by failing to plead it, but he may, by the great weight of authority, stipulate not to plead it.[31] Nor does it violate any prin-

[25]Brady *v.* Nally (1896) 151 N. Y. 258; *accord,* Karpf *v.* Borgenicht (N. Y. 1910) 65 Misc. 592.

[26](1898) 119 Ala. 547, 24 So. 549; *accord,* Flora *v.* Carbean (1868) 38 N. Y. 111. See 17 Cyc. 800.

[27]Prelim. Treatise Ev. 263.

[28]Phyfe *v.* Eimer (1871) 45 N. Y. 102, 106.

[29]Matter of Weeks (1905) 106 N. Y. App. Div. 45.

[30]Crane *v.* Powell (1893) 139 N. Y. 379, 388.

[31]25 Cyc. 1013; *contra,* Wright *v.* Gardner (1895) 98 Ky. 454, 33 S. W. 622, on the ground that such a stipulation is against public policy.

ciple of public policy for the parties to shorten the period of the statute of limitations by stipulation.[32] *Crane* v. *Powell*[33] mentions not only the statute of limitations and the statute of frauds as shields "which a party may use or not for his protection," but also usury statutes and statutes against betting and gaming. On first impression, one might be inclined to doubt whether usury and gaming statutes properly belong in the same category—it would seem as if there were a public policy forbidding their waiver. But the law has never condemned either usury or gambling as *mala in se* of which it was bound to take notice under all circumstances. Usury laws are intended to protect needy borrowers, not to punish extortion in money lenders,[34] and while gaming is now usually made a statutory offense, the influence of the statutes has not overcome that of the common law (under which gaming was not indictable) to the extent that a waiver of the defense of gaming is regarded as against public policy.[35]

That a witness may waive his right to invoke the common constitutional provision against being compelled to be a witness against himself, as a question of public policy, seems never to have been doubted; and an examination of the principles underlying some cases that have received much public criticism in recent years, as permitting "immunity baths" to those who desire to escape criminal liability, will show that the fault lies not with the judges but with the statutes granting immunity. These, in many instances, were so framed as not to distinguish between voluntary and involuntary witnesses before juries. This resulted in decisions such as that in the New York case entitled, *In re Grand Jury*[36] where in an advice to the grand jury, it was stated that the New York statute forced immunity, even on the witness willing to waive it—an interpretation promptly changed by statute;[37] and in *United States* v. *Armour*,[38] where the conclusion was reached that the exemption of the statute was even broader than the constitutional privilege of the Fifth Amendment in that while the latter but afforded a shield to the witness, the statute wiped out the crime altogether. But where the language of a statute does

[32]Riddlesbarger *v.* Hartford Ins. Co. (1868) 7 Wall. 386, 391, and cases cited.

[33](1893) 139 N. Y. 379, 388.

[34]39 Cyc. 999.

[35]Cowton *v.* Anderson (1845) 1 How. Pr. 145.

[36](1912) 135 N. Y. Supp. 103

[37]Act of April 13, 1912 (N. Y. Laws of 1912, c. 32.)

[38](D. C. 1906) 142 Fed. 808.

not interfere, no case seems to hold that it is against public policy to permit such a waiver.

Can husband or wife, as a party to a suit, waive the right to object to the testimony of the spouse, when there is a clear right, founded on the marital relation, to raise an objection?

As Professor Wigmore has pointed out,[39] this question has been sometimes obscured by the tendency to confound "privilege" with "disqualification." The reasoning of a majority of the courts is that if there is a willingness to waive the objection, no public policy forbids. One decision, at least, is squarely *contra* and declares the exclusion of such testimony to be a matter of public policy.[40] But other cases cited by Prof. Wigmore as *contra*[41] are based rather on the ambiguity of statutes which declare such evidence "incompetent" without indicating whether the incompetency is absolute or removable by waiver, or on text-book statements similar to that made by Kent and likewise ambiguous, that "the husband and wife cannot be witnesses for or against each other in a civil suit."

On principle, there should be no objection to waiver. Certainly, after we have read Professor Wigmore's interesting chapter on this subject[43] it is difficult to see what is the rationale of this doctrine of marital privilege, and likewise difficult to see why marital privilege may not be waived or even removed by statute, as has been done in a few jurisdictions.[44]

In the case serving as our text, it was stated that parties might stipulate that the judgment of the trial court should be final and thus waive the right of appeal. That is the law of New York, without question,[45] but it is a point on which the authorities seem fairly well balanced. With New York are, at least, four other jurisdictions,[46] but at least five States are opposed.[47]

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[39]Wigmore, Evidence § 2334.

[40]Robinson *v.* Robinson (1900) 22 R. I. 121, 46 Atl. 455.

[41]Wigmore, Evidence § 2242 and notes.

[42]2 Kent, Comm. (12th ed.) *179.

[43]Wigmore, Evidence c. 77.

[44]*Ibid* §§ 488, 2245.

[45]Townsend *v.* Masterson Co. (1857) 15 N. Y. 587; Gitler *v.* Russian Co. (1908) 124 N. Y. App. Div. 273.

[46]Oliver *v.* Blair (Cal. 1885) 5 Pac. 917; Palmer *v.* Lavers (Mass. 1914) 105 N. E. 1000; Cole *v.* Thayer (1872) 25 Mich. 212; Commonwealth *v.* Johnson (1847) 6 Pa. St. 136.

[47]Wasson *v.* Heffner (1862) 13 Ohio St. 573; Sanders *v.* White (1857) 22 Ga. 103; Fahs *v.* Darling (1876) 82 Ill. 142; Runnion *v.* Ramsay (1885) 93 N. C. 410; State *v.* Judge (1859) 14 La. Ann. 323.

On the whole, logic appears to be with the New York rule. Public policy is in no way concerned with the option which every man has to sue or forbear to sue, and if he binds himself to end his legal proceedings half way, it is of no public interest.[48]

May the parties oust the court of jurisdiction by stipulation? This may be attempted in various ways. There may be a proviso inserted in a contract that all disputes are to be referred to arbitration and that the arbitrator's decision shall be final, there may be a proviso that should any dispute arise, it is to be referred only to a foreign jurisdiction, or there may be a proviso that suit may only be brought in certain courts of competent jurisdiction and not in others equally competent.

In numerous cases[49] the Court of Appeals of New York has declined to recognize stipulations remitting all questions to arbitration, and has held that such a contract would not be enforced, even though valid where made.

This is settled and familiar law, both in England and in this country, and perhaps *Stephenson* v. *Piscataqua Ins. Co.*[50] states the reason of the rule most clearly when it says:

"The law and not the contract prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy, in a given case, than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void."

The rule is the same whether the stipulation purports to cover all questions which may arise between the parties or merely all questions arising under a particular case—the court will not hold binding a stipulation to withdraw from their jurisdiction all future controversies.[51]

With reference to agreements that a foreign court shall have exclusive jurisdiction, the Supreme Court of the United States has just delivered an interesting and instructive opinion in the case of *Tennessee Coal, etc., Co.* v. *George*,[52] wherein a plaintiff brought

[48]See opinion of Scott, J., in Gitler *v.* Russian Co. (1908) 124 N. Y. App. Div. 273.

[49]The latest of which is Meacham *v.* Jamestown, etc. R. R. (1914) 211 N. Y. 346.

[50](1886) 54 Me. 55, 70.

[51]Hamilton *v.* Home Ins. Co. (1890) 137 U. S. 370; Munson *v.* Straits of Dover S. S. Co. (D. C. 1900) 99 Fed. 787, affirmed (C. C. A. 1900) 100 Fed. 1005; Seward *v.* Rochester (1888) 109 N. Y. 164, 169.

[52](1914) 233 U. S. 354.

suit in Georgia on a statutory cause of action created by the law of Alabama, and in so doing ignored a provision of said statute that suit must be brought in Alabama, and not elsewhere.

The Supreme Court held that the plaintiff was not bound by the proviso. "Venue," said Mr. Justice Lamar,[53] "is no part of the right [of action]; and a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction."

The waiver of the right to go outside a certain jurisdiction for the remedy has almost uniformly been treated as not binding, the question repeatedly arising in insurance cases and, with the exception of one case in Massachusetts[54] regarded by Mr. Justice Cardozo[55] and the learned editor of the New York Law Journal[56] as exceptional in nature, the courts seem to be unanimous. Once granted that the right can be enforced through the remedy offered by a court of foreign jurisdiction as well as through the remedy offered by the court to which jurisdiction is sought to be limited, and the attempt to oust the foreign court of jurisdiction should fail, for the reason set forth by Mr. Justice Lamar.

There is a doctrine upheld in most jurisdictions which appears to support parties who would waive the right, in making a contract, to have that contract governed by the law of the place of contracting—the anomalous doctrine that the law governing a contract is the law that the parties intend shall govern it.[57] It would perhaps be more accurate to speak of this rule not as a waiver by the parties but as a waiver by the State of its undoubted right to give a legal effect to every act within its borders, for even though the parties might actually have wished to be bound by the *lex loci contractus,* this doctrine, which interprets their intent by their acts, might prevent. Although somewhat aside from our subject, it may be said that we have here an instance where contracting parties can actually ignore the law which makes legally binding the agreement between them, and are aided by that law itself in so doing.

In *Insurance Co.* v. *Morse*[58] an attempt was made by the legislature of Wisconsin to prevent insurance companies from removing

[53]At p. 360.

[54]Mittenthal *v.* Mascagni (1903) 183 Mass. 19.

[55]Meacham *v.* Jamestown, etc., R. R. (1914) 211 N. Y. 346, 353.

[56]N. Y. L. J., June 10, 1914.

[57]Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co. (1889) 129 U. S. 397; *In re* Missouri S. S. Co. (1889) 42 Ch. D. 321.

[58](1874) 87 U. S. 445.

cases to the federal courts by requiring them to stipulate, as a condition of doing business in the State, that they would not remove any case.

This was held not binding on the insurance company for two reasons—first, that the law and not the contract prescribes the remedy,[59] and, second, that the federal Constitution gives an absolute right of removal to citizens of other States which cannot be affected by a State statute nor lost by stipulation not to invoke the same.

Can a court acquire jurisdiction not conferred upon it by law merely by consent of the parties?

It is elementary law that it cannot, either in a court of first instance,[60] or on appeal.[61] Public policy does not permit individuals to force classes of actions on courts in which neither constitutional nor statute law has given them jurisdiction, for such a procedure might disarrange the whole judicial system. But where the objection is merely to the technical process by which the powers or jurisdiction of the court have been invoked, there is no reason why a waiver of such objection should not be held binding.

Decisions of the Supreme Court of the United States on the question of the removal of causes from state courts well illustrate this difference. Thus where both parties are citizens of the same State and the case has been removed to the federal court on the sole ground of diversity of citizenship, the consent of both parties will not suffice to give the court jurisdiction, and although the court below may have treated the waiver as binding, the appellate court will not do so.[62] On the other hand, a waiver of the right to object to the time of the filing of the petition for removal is binding, for the time of filing is in no way essential to the jurisdiction.[63]

The federal courts speak of objections of this last mentioned kind as "modal and formal" and have treated them as clearly distinguishable from objections going to the jurisdiction itself. It is largely a question of statutory interpretation. Did the legislature

[59]Quoting the opinion in Stephenson *v.* Piscataqua Ins. Co. (1886) 54 Me. 55.

[60]11 Cyc. 673.

[61]Davidsburgh *v.* Knickerbocker Ins. Co. (1882) 90 N. Y. 526; Roseberry *v.* Valley Building Assn. (1902) 17 Colo. App. 448, 68 Pac. 1063.

[62]Powers *v.* C. & O. Ry. (1898) 169 U. S. 92, 98; Rexford *v.* Brunswick-Balke Co. (1913) 228 U. S. 339, 344; Mansfield, etc., Ry. *v.* Swan (1884) 111 U. S. 379; Dred Scott *v.* Sanford (1856) 19 How. 393, 401.

[63]Ayers *v.* Watson (1885) 113 U. S. 594, 598.

use language that shows a clear intent that the waiver of the objection should be beyond the control of a party to the suit? Is the right involved one designed merely for the protection of the party to a suit or for the general interests of justice?

And cases involving the disqualification of judges on the ground of consanguinity or interest seem to turn, also, on the language of the statute. If the court finds a positive prohibition on a judge sitting, the consent of one or both parties is of no avail.[64] If, on the other hand, the statute does not expressly prohibit it, a judge, even though interested, may, it seems, sit by consent of the parties.[65]

It is suggested in *Oakley* v. *Aspinwall*,[66] that even though the parties consent, the State should not permit the judge to act, for the State is concerned not only that the particular suit be justly determined, "but that the judiciary shall enjoy an elevated rank in the estimation of mankind." However, while there are numerous references to the common law as the source of disqualification, there seem to be no authorities going so far as to hold that, in the absence of statutory inhibition, consent of the parties is not sufficient to give a judge jurisdiction.

The right to waive a constitutional objection has, in general, been treated in accordance with the rule laid down by the case with which we began this discussion,—constitutional provisions designed to protect only private property rights are treated as no more sacred than statutory provisions and are subject to waiver.[67] We have already discussed constitutional provisions arising in criminal cases.

That a court should not be bound by the admission of a party that an act is unconstitutional seems obvious. Certainly this is a question of public interest of too great importance to be determined by a waiver in a suit between individuals. And such is the almost unanimous holding.[68]

On the other hand, an admission of constitutionality has been held binding, but only in cases where a party has received a benefit under the law the constitutionality of which is questioned. If the

[64]Oakley *v.* Aspinwall (1850) 3 N. Y. 547, 552.

[65]Utz & Dunn Co. *v.* Regulator Co. (C. C. A. 1914) 213 Fed. 315; Coltrane *v.* Templeton (C. C. A. 1901) 106 Fed. 370, 376.

[66](1850) 3 N. Y. 547, 552.

[67]Cooley, Const. Lim. (7th ed.) 250-252.

[68]State *v.* Armour Packing Co. (1904) 135 N. C. 62, 47 S. E. 411; Happel *v.* Brethauer (1873) 70 Ill. 166; *contra,* Norman *v.* Ky. Board (1892) 93 Ky. 537, 20 S. W. 901.

party has received no such benefit, an admission of constitutionality is no more binding than an admission of unconstitutionality. This distinction rests not on the doctrine of waiver but on that of unjust enrichment, it being possible to find the terms of an agreement implied in law in an invalid enactment.[69] The general rule, therefore, is that the admissions or waivers of a party do not bind the court, either as to the constitutionality or unconstitutionality of a law.

The various classes of cases cited in this article indicate an apparent intention in the courts to permit the parties to make their own law of procedure within as broad limits as possible. Unless human life is at stake, or there are positive prohibitions of the written law, there seems no desire to prevent them from acting on their own ideas of proper evidence or of waiving procedural provisions intended for their benefit. On the whole, this is a wise and intelligent attitude for the courts to take. Keeping in mind a fact already alluded to—that under the common law system of evidence, "a great mass of evidential matters, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else,"[70] and that rules of procedure concern only the machinery by which legal controversies are settled, a departure from which can hardly involve a question of public policy or morals,—there is no valid objection to be taken to the extension of the right of waiver, even in the field of criminal law where rules of evidence and procedure most frequently are given undue weight.

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[69]See O'Brien *v.* Wheelock (1902) 184 U. S. 450, 491.

[70]Thayer, Prelim. Treatise Ev. 1.